## IN THE UNITED STATES DISTRICT COURT FOR THE EASTERN DISTRICT OF NORTH CAROLINA WESTERN DIVISION

NO. 5:08-CR-326-FL NO. 5:12-CV-193-FL

HUGHIE DALLAS BREWINGTON, JR.,	)	
	)	
Petitioner,	)	
	)	
V.	)	ORDER
	)	
UNITED STATES OF AMERICA,	)	
	)	
Respondent.	)	

This matter comes before the court on petitioner's motion pursuant to 28 U.S.C. § 2255 to vacate, set aside, or correct sentence (DE #25). On May 29, 2012, the government filed a motion to dismiss, arguing that the petition was un timely filed. However, on August 27, 2012, the government filed notice of withdrawal of its motion to dismiss and waived its previously asserted defenses. The government suggests that the court reach the merits of the § 2255 petition.

On August 4, 2009, petitioner pleaded guilty to feen in possession of a firearm in violation of 18 U.S.C. §§ 922(g). The court sentenced petitioner on December 9, 2009, to a term of 115 months' imprisonment, followed by a three-year termof supervised release. Judgment was entered July 21, 2009.

In light of <u>United States v. Simmons</u>, 649 F.3d 237 (4th Cir. 2011) (en banc), petitioner does not have a prior conviction of a crime punishable by imprisonment for a term exceeding one year. Therefore, a necessary element of the crime of conviction is lacking. <u>See</u> 18 U.S.C. § 922(g)(1). Where the government waives defenses previously asserted in m otion to dismiss, and where the court, having reviewed the record, finds petitioner's motion meritorious, said motion is GRANTED,

and judgment and sentence dated July 21, 2009, is VACATED. Petitioner is ORDERED to be released from federal custody, subject to pending detainers, if any, unless some cause be shown by the government on or before noon on August 30, 2012, why petitioner is not now entitled to this relief.

SO ORDERED, this the 28th day of August, 2012.

LOUISE W. FLANAGAN United States District Judge

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